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No. 80-5392

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR., *Petitioner,*

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES,

NORMAN CARLSON, DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS, AND

WILLIAM CIUROS, JR., COMMISSIONER OF CORRECTIONS, STATE OF VERMONT, *Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

This Reply Brief addresses arguments set forth in Point I of the Brief for the Federal Respondents and also sections of the Brief for Respondent Ciuros.

1. The Petitioner has a Private Right of Action Under 18 U.S.C. §4001(a) to Challenge his Unlawful Confinement in Federal Prison.

Throughout this litigation the respondents argued only the merits.[1] Even in this Court the government's three

[1] The government's statement of the issue to the Second Circuit (p. 3 of its Second Circuit brief) asked whether "the requirements of 18 U.S.C. §5003 are satisfied when the United States Bureau of

Questions Presented (Br. i) address the substantive scope of 18 U.S.C. §5003 and the derivative procedural issue. Now for the first time the government contends (Br. 18-23) that petitioner lacked standing to sue. He had, the government says, no "individualized" cause of action and thus can not be heard to complain that he is held illegally in federal prison. If this contention is correct, it makes no difference whether or not he is held illegally.

To be sure, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon* v. *University of Chicago,* 440 U.S. 677, 688 (1979), citing *Cort* v. *Ash,* 442 U.S. 66 (1975). The government concedes (Br. 18) that statutes cast in an "individualized 'no person' formulation" can create private rights of action, and indeed they almost invariably do. *Cannon,* at 691 n.13. Such a statute is 18 U.S.C. §4001(a), which expressly guarantees that

> *No citizen shall be imprisoned* or otherwise detained *by the United States* except pursuant to an Act of Congress.

Prisons certifies that appropriate correctional facilities exist within the federal system for the accommodation of state prisoners." The argument in that brief addressed that issue. Similarly, in its brief in response to our petition for certiorari the government put the question as "[w]hether 18 U.S.C. [§] 5003 conditions the power of federal authorities to accept state prisoners into custody on a showing that the prisoners are in need of specialized treatment available only in the federal system."

Cort v. *Ash* sets forth a four part standard which this statute indubitably meets: 1) It creates a federal right in all citizens against federal imprisonment by executive order or arrangement without legislative mandate. 2) There seems to be no explicit evidence of legislative intent to create a private action but such evidence is not necessary. *Cort* at 82. 3) Finding a private right of action is fully consistent with the legislative purpose. The only other agent likely to police this limitation on the Attorney General's power is the Attorney General himself. 4) The lawfulness of federal imprisonment is a concern of the federal courts and is not "an area basically the concern of the States . . ." Cort at 78.

Petitioner therefore has standing to claim that he has been imprisoned by the United States not pursuant to an Act of Congress. The validity of that claim depends on the scope of §5003. The merits are properly before the Court.[2]

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[2] Section 4001(a)'s overarching ban on unauthorized imprisonment is not mentioned in the government's argument on standing. In a later footnote (Br. 25 n. 13) the government asserts that the statute does not even apply to the petitioner because he has been convicted of a crime. This contention is belied by the plain and unambiguous language of §4001(a) ("No citizen . . ."). It finds no support in the legislative history. The statute was passed to "restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists." H.R. Rep. No. 92-116, 92d Cong., 1st Sess., quoted in 1971 U.S. Code Cong. & Admin. News 1435. The Department of Justice offered an amendment to the proposed bill, which the Committee and Congress adopted, to assure that no *federal* convict should be covered by the general ban on federal imprisonment. The Department thus recognized at that time that §4001(a) applied by its terms to convicts and non-convicts alike. Id. at 1437.

2. The Bureau's Certification of Available "Facilities" does not Block Inquiry into the Legality of Petitioner's Confinement.

In a similar vein the government next argues (Br. 20-23) that the administrative certification of "facilities" is dispositive and therefore the scope of §5003's authorization is not open to question by a transferred inmate.

The subject matter of certification under §5003 is "treatment facilities and personnel," and we argue that the statute looks to enrollment of state prisoners in such treatment facilities. The government has not disputed this construction, and indeed to do so would render the entire certification clause meaningless. The government focuses instead on the purpose of certification and the manner in which it is carried out, arguing that the requirement was merely "an internal agency housekeeping measure" designed to assure that room is available for state prisoners; that the measure is probably superfluous since the Attorney General has delegated his contracting authority to the Director of the Bureau of Prisons; that contracts pursuant to certification may be made for "groups of prisoners"; and that such certification is unreviewable. Presumably, if the statute required certification of appropriate "hospitals" and the transferee were sent to a certified dungeon, the government would claim full compliance with the law so long as the certification had been made in the statutory language.

In the analogous situation of Youth Corrections Act certifications and placements, courts have inquired into substance, not form. Thus, *Robinson* v. *United States*, 474 F.2d 1085, 1091 (10th Cir. 1973) relied on by the govern-

ment (Br. 22 n.11) held that there need not be individual certifications of YCA facilities. But where individual facilities are shown not to be "treatment facilities" in fact courts have given relief. E.g. *Harvin* v. *United States*, 445 F.2d 675 (D.C. 1971) and cases cited at p. 32 of our main brief.

In any event the formal argument does not advance the government's case on the facts presented. The certification here was not in the statutory language; the Director has not certified the availability of "proper and adequate treatment facilities and personnel," but only that prison facilities are available.[3] J.A. 10. If there is, as we argue, a significant difference between the two, the certification is facially defective. If "treatment facilities" is a euphemistic or figurative expression for prisons, as the government contends, the certification is facially correct even though not in the words of the statute. Thus, even if the court agrees that it should not "look behind the face of the certification" (Br. 21), the question of the statute's scope must be decided.

The government's argument that certification need not be made on a case-by-case basis (Br. 20-21) also misses the point. Elsewhere it concedes (Br. 16) that if "treatment facilities" means what we say it means a prisoner is entitled to an individual determination of his treatment needs as a matter of due process. The need for a case-by-case determination thus depends on the substantive

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[3] We do not concede (as the respondents suggest, Br. 14) that the formal requisites have been met.

scope of the statute; again that issue can not be sidestepped.

3. The Legislative History Conforms with the Plain Meaning of §5003(a).

a. The government calls for close analysis of the statutory language but offers none (Br. 17-18). The section at issue consists of an independent clause, concerning the scope of the contract, and a dependent clause concerning certification:

> The Attorney General*** is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence education, treatment and training of persons convicted of criminal offenses in the courts of such State or Territory***
>
> [W]hen the Director shall certify that proper and adequate treatment facilities and personnel are available***

The government reads this as if the dependent clause were omitted, arguing that "treatment" in the independent clause enjoys no "grammatical primacy," that the list "runs the gamut of penological purposes," and that the contract has other purposes than treatment. To be sure, the states must be bound to pay for all services incidentally provided.[4] None of this alters the fact that the subject of the contract is certified treatment facilities and personnel.

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[4] The full reimbursement expected from the states is explicit on the face of the statute and in the legislative history.

As noted in our main brief, the two clauses of §5003(a) are in the same words, and bear the same relation to one another, as §§5012 - 5013 in the Youth Correction Act, a coincidence of language which reinforces our contention that "treatment facilities" in §5003 does not merely mean "federal prisons."

b. The government mistakenly characterizes our construction of §5003 as requiring a pre-transfer determination that state facilities are not adequate; that proper and adequate facilities exist *only* in the federal system. Br. 15, 17, 18, 24, 37, 46. The state's brief similarly misstates our position.

The face of the statute affirmatively requires that appropriate treatment facilities be available in the federal system, but it does not by its terms require that such facilities *not* be available in the state system. The Seventh Circuit wrote in *Lono* v. *Fenton*, 581 F.2d 645 (1978) and again in *Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), that the absence of suitable state facilities should be a precondition for any §5003 transfer, finding ample support for this conclusion in the legislative history. We have not pressed that argument here because it is unnecessary for the decision of this case. First, the record shows beyond doubt that the express affirmative requirement of the federal statute has not been met. There may be a plethora of treatment facilities in the federal prison system, but the petitioner is not enrolled in one. Second, the absence of suitable in-state facilities is a requirement of state law. 28 V.S.A. §706(a).

The government's dismissal of the legislative history of the statute as "more concerned with explaining the

states' need for a measure such as S. 2160 than with describing the situations to which it would apply" has force only in connection with the implied negative requirement (no suitable state alternatives) which we do not contend for. But with regard to the affirmative requirement that there be adequate federal treatment facilities, the legislative history is in complete harmony with the plain language of the statute: the states lacked treatment facilities and the Congress undertook to make the Bureau's treatment facilities accessible. The statute as enacted met the states' stated needs, no more no less.

Senator McCarren's statement on the Senate floor that the statute permitted transfers "in a limited category of cases," 97 Cong. Rec. 13543 (1951) was an explanation of the scope of the Attorney General's authority. The Senator was not merely predicting that "in most cases the states would have the necessary facilities to handle their own prisoners . . .," as the government contends. Br. 27. This explanation of the statute to the Senate is of course fully consonant with the construction placed upon it in the House Committee Report.

4. There is no Conflict Between §5003(a) and §5003(c).

The government contends that our construction of the §5003(a) makes the statute internally inconsistent. United States prisoners, the government points out, can be freely transferred and classified into programs which are not treatment facilities. Section 5003(c) provides that transferred state prisoners "be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not

inconsistent with the sentence imposed." Hence, the government contends, state prisoners must also be freely transferrable.

This argument, as the Seventh Circuit noted in *Anthony,* "falls of its own weight." Slip op. 14 n.14.[5] State prisoners are transferred to treatment facilities whereas federal prisoners are committed to federal prison. Section 5003(c) was intended to assure that *within* federal treatment facilities all prisoners should be treated alike, "in order that there be no favored inmates or group of inmates." H.R. Rep. No. 1663 quoted in 1952 U.S. Code Cong. & Admin. News 1421.

CONCLUSION

For the above stated reasons and for the reasons stated in petitioner's main brief, the judgment of the Court of Appeals for the Second Circuit should be reversed.

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[5] Vermont also argues extensively on the basis of §5003(c). Br. 15-17.